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THE BENEFITS OF ALTERNATIVE DISPUTE RESOLUTION IN COMMON INTEREST DEVELOPMENT DISPUTES

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Feuding with one's neighbor is an American tradition.¹ Robert Frost aptly expressed this sentiment in his famous line, "Good fences make good neighbours."² People take their living situation seriously, and they become irritated when their neighbors interfere with their rights or invade their privacy. Small disputes can often fester into hatred and strife. Moreover, once the relationship between neighbors has soured, it can be difficult or impossible to repair. These problems worsen when neighbors live close to one another. In common interest developments, such as condominiums ("condos") and cooperatives ("co-ops"), neighbors share walls, elevators, lawns, and common areas. These close quarters make the potential for discord between neighbors more likely among them than among owners of single family homes who do not share these common areas.

Like relationships between neighbors, tenants' relationships with their landlords can also be contentious.³ In recent years, the condo or co-op board of directors (the "board") has become a

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¹ See, e.g., LAWRENCE D. HATFIELD, *THE TRUE STORY OF THE HATFIELD AND MCCOY FEUD* (1944) (detailing the infamous dispute between two neighboring families on the West Virginia-Kentucky border).

² Robert Frost, *Mending Wall*, in *NORTH OF BOSTON* 12 (1914).

³ See Scott E. Mollen, *Alternate Dispute Resolution of Condominium and Cooperative Conflicts*, 73 ST. JOHN'S L. REV. 75, 75 (1999) (noting that the landlord-tenant relationship is the most passionate relationship next to love or sex).

surrogate for the landlord.⁴ The board handles noise complaints, collects maintenance fees, and enforces a variety of other rules and regulations. The board's paternalistic role may create animosity and resentment in condo or co-op residents, many of whom are forced to comply with rules that they glossed over when they purchased their unit.

More people are living in condos and co-ops than ever before.⁵ For a variety of reasons, the demand for this type of housing is likely to continue.⁶ As more people move into common interest developments, the number of disputes and the amount of litigation will continue to increase.⁷

Because litigation is expensive and time-consuming, both common interest development boards and unit owners suffer when parties bring their disputes to court. Alternative dispute resolution ("ADR") is an important solution. This Article will examine the rise of common interest development ownership, the increase in conflicts in common interest developments, the disadvantages of traditional litigation, the advantages of ADR, and the various forms of ADR in other jurisdictions.

I. THE INCREASE IN CONDO AND CO-OP OWNERSHIP

During the last quarter century, the United States real estate market has seen a dramatic increase in condo and co-op ownership.⁸ Between 1970 and 2006, the number of common interest developments has expanded from 10,000 communities

⁴ See, e.g., *Martinez v. Woodmar IV Condos. Homeowners Ass'n*, 941 P.2d 218, 220–21 (Ariz. 1997) (holding that a condominium board owes the same duties to a resident as a landlord owes to a tenant).

⁵ See Patrick J. Rohan, *Preparing Community Associations for the Twenty-First Century: Anticipating the Legal Problems and Possible Solutions*, 73 ST. JOHN'S L. REV. 3 (1999) (discussing the tremendous growth in condo and co-op ownership in recent years); see also Mollen, *supra* note 3, at 77–79 (discussing various economic and social changes that have led to increased numbers of common interest developments).

⁶ See Rohan, *supra* note 5, at 5–10 (detailing a variety of reasons for the increase in condo and co-op ownership); see also Mollen, *supra* note 3, at 77–79.

⁷ Lawrence M. Grosberg, *Using Mediation To Resolve Residential Co-op Disputes: The Role of New York Law School*, 46 N.Y.L. SCH. L. REV. 499, 504 (2002) ("Indeed, for at least a couple of reasons, the rate of increase in conflicts is probably much greater than the growth rate in the numbers of co-op residents.").

⁸ See Michael H. Schill et al., *The Condominium Versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. LEGAL STUD. 275, 275–76 (2007) (noting that the number of condos and co-ops has increased 227% from 1982 to 2007).

with 701,000 housing units to 286,000 communities with 23.1 million units.⁹ Although the increase has occurred across the country, it has been particularly acute in New York City.¹⁰ One commentator predicts that in the future the rental market will “all but disappear in every major city.”¹¹

Both legal and social changes have caused this increase in condo and co-op ownership. America’s aging population is one cause.¹² As people get older and their children leave home, they often sell their large houses to avoid significant physical upkeep and mortgage payments.¹³ Common interest developments usually require less maintenance, which is often provided by the development, and mortgage payments for common interest developments are lower. Moreover, the elderly become increasingly infirm, and nursing homes and assisted living communities are often organized as common interest developments.¹⁴

The emergence of the two-income family has also led to an increased demand for common interest developments.¹⁵ Leisure time becomes scarcer when both the husband and wife work. After a long day of work, they want to spend time with their families, without the chores and responsibilities of a large single-family home. Moreover, they appreciate the amenities that most condos and co-ops offer, such as laundry, dry cleaning, and housekeeping services. Even without these services, people prefer condos and co-ops because they can avoid the maintenance and upkeep traditionally associated with single-family homes.

⁹ G. Stephen Elisha & Tracey S. Wiltgen, *ADR Spotlight: Resolving Condominium Disputes: Mediation Works*, 10 HAW. B.J. 12, 12 (2006).

¹⁰ See Schill et al., *supra* note 8, at 278 (noting that New York City condo and co-op ownership has increased from fifteen percent to thirty percent of owner occupied housing); see also Shannon Behnken, *High Rises, High Stakes*, TAMPA TRIB., July 31, 2005, at 1 (explaining the recent increase in condominiums on Florida’s west coast); Melinda Fulmer, *The Great American Condo Glut*, MSN REAL ESTATE, available at http://www.kevintomlinson.com/article-detail.php?article_id=337 (commenting on condominium growth throughout the United States).

¹¹ Rohan, *supra* note 5, at 4.

¹² *Id.* at 8–9.

¹³ Grosberg, *supra* note 7, at 503; Mollen, *supra* note 3, at 78–79.

¹⁴ Rohan, *supra* note 5, at 4.

¹⁵ Grosberg, *supra* note 7, at 503; Mollen, *supra* note 3, at 78.

Other social concerns also explain the increase in condo and co-op ownership. One such concern is the increased desire for home security.¹⁶ Common interest developments are often gated communities that have their own security personnel.¹⁷ These developments prevent nonmembers from entering the community. Moreover, common interest developments afford people the opportunity to live closer to where they work.¹⁸ Suburban sprawl has increased the number of cars on the road and increased commute times.¹⁹ Condos and co-ops located in major metropolitan areas offer people an alternative to the hour-long commute associated with living in a single family home in the suburbs. Furthermore, those people who are not necessarily motivated by a shorter commute from suburbia may nonetheless be attracted to common interest developments for their recreational facilities.²⁰

In addition to social factors, changes in state and federal law have also increased the number of common interest developments,²¹ notably tax rules, land-use regulations, and zoning laws. Traditionally, a landlord's depreciation deduction on real property decreases every year and eventually disappears.²² The landlord's mortgage interest deductions also decrease and ultimately end.²³ When a building is no longer a tax shelter, the landlord is enticed to convert the building into a condo or a co-op.²⁴ Tax laws also encourage renters to support condo and co-op conversions, or to move to common interest

¹⁶ Grosberg, *supra* note 7, at 503; Mollen, *supra* note 3, at 79.

¹⁷ See Rohan, *supra* note 5, at 9 n.17 (noting that the elderly seek out condos and co-ops in gated communities that provide "monitoring of visitors and night ground patrol by association personnel").

¹⁸ Grosberg, *supra* note 7, at 503; Mollen, *supra* note 3, at 78.

¹⁹ See OLIVER GILLHAM, *THE LIMITLESS CITY: A PRIMER ON THE URBAN SPRAWL DEBATE* 93 (2002) (suggesting that sprawl has resulted in roads that are "overwhelmed" and "hours spent driving and stuck in traffic").

²⁰ See Rohan, *supra* note 5, at 7–8 (discussing the demand for condos and co-ops that provide amenities such as golf courses, tennis courts, and swimming pools).

²¹ See Evan McKenzie, *Reinventing Common Interest Developments: Reflections on a Policy Role for the Judiciary*, 31 J. MARSHALL L. REV. 397, 400 (1998) (discussing state and federal approaches to the regulation of common interest developments).

²² Rohan, *supra* note 5, at 6.

²³ See *id.*

²⁴ This is especially true in light of the other risks and liabilities that the landlord may face. Landlords face a minefield of legal issues, ranging from tort actions for failure to properly maintain the building to potential liability for injuries caused by tenants' pets.

developments, as mortgage interest is a tax-deductible expense.²⁵ Conversions benefit tenants by enabling them to remain in their home while becoming an owner rather than a renter. On the other hand, tenants generally cannot deduct residential rent.²⁶

Land use regulations that limit the amount of development space have also increased incentives to build condos and co-ops. Scott Mollen, a leading condo and co-op practitioner, notes that “as development expands, land use regulation becomes more restrictive[,] thereby increasing the cost of property development.”²⁷ Condos and co-ops offer developers the opportunity to fit more units on smaller parcels of land. The developers can then take advantage of “cluster” housing ordinances in local zoning codes that allow them to build high density units, while preserving undeveloped open spaces.²⁸

Additionally, local governments may not have the budget to build new infrastructure, such as public roads and sewage treatment facilities.²⁹ Developers, consequently, turn to condos and co-ops over single-family houses to spread maintenance costs among the residents.³⁰ By minimizing the amount of land per housing unit, condos and co-ops offer developers the opportunity to maximize profits and minimize zoning obstacles.

Major legislative changes in the 1980s dramatically increased co-op ownership in New York City. Post World War II rent regulations had eliminated many economic incentives to owning rental property.³¹ The New York City legislature changed these laws, streamlining the conversion process from rental property to co-ops, which enabled many landlords to

²⁵ 26 U.S.C. § 163 (2006).

²⁶ See *id.* The I.R.S. tax code does not allow a deduction for residential rental expenses.

²⁷ Mollen, *supra* note 3, at 78.

²⁸ See Rohan, *supra* note 5, at 8 (citing Tom Pierce, Note, *A Constitutionally Valid Justification for the Enactment of No-Growth Ordinances: Integrating Concepts of Population Stabilization and Sustainability*, 19 U. HAW. L. REV. 93, 144 n.72 (1997)) (cluster housing is the concept of allowing high density housing units to preserve the surrounding open space).

²⁹ See *id.* (“Faced with restrictive municipal fiscal policies, the developer has little choice but to create a home owner association to administer the private roads and other facilities after the builder’s departure.”).

³⁰ See *id.*

³¹ *Id.* at 6–7 (noting that rent control had led to landlords neglecting to maintain their buildings and investors becoming disinterested in building new rental housing in New York City).

convert their rental apartments into co-ops.³² Furthermore, the New York State legislature amended the New York Banking Law in ways that encouraged more lending to co-op purchasers.³³ Along with zoning laws, these changes demonstrate how state and local governments have facilitated the growth in common interest developments.

Lastly, economic incentives have contributed to the rise of common interest developments. Rental building owners are faced with skyrocketing operating costs,³⁴ which often compel them to simply “cash out” of their buildings and convert them into condos or co-ops. In fact, these costs may dissuade developers and real estate investors from building rental property in the first place.

II. DISPUTES INVOLVING COMMON INTEREST DEVELOPMENT

Owners in common interest developments generally get along with their neighbors³⁵ and believe that the board acts in their best interest.³⁶ Yet the increase in common interest developments has led to more disputes between residents and board members.³⁷ In New York City, the problem was so pronounced that a separate court was created to deal with co-op and condo disputes.³⁸ One study found that “nearly two-thirds of co-op and condominium associations in New York City had filed lawsuits [between 1993 and 1996].”³⁹ This number does not

³² See N.Y. GEN. BUS. LAW § 352-eeee(1)(b)–(c) (McKinney 2010); see also Grosberg, *supra* note 7, at 501 (stating that because the number of tenants required to approve a conversion of a building from rental to co-op was reduced from fifty percent to fifteen percent, there were many more buildings that converted).

³³ See N.Y. BANKING LAW § 235(8-a) (McKinney 2010); see also Grosberg, *supra* note 7, at 502.

³⁴ See Rohan, *supra* note 5, at 6–7 (discussing rising expenses such as fuel costs, insurance, utilities, labor, compliance with local regulations, potential tort claims, environmental regulations, and discrimination suits that may drive building owners out of the rental market).

³⁵ See Elisha & Wiltgen, *supra* note 9, at 14 (citing a poll that found that eight-six percent of community association members get along “well” with their neighbors and sixty-three percent get along “very well” with their neighbors).

³⁶ See Found. for Cmty. Ass’n Research, 2009 National Research, http://www.cairf.org/research/survey_homeowner.aspx (last visited Oct. 30, 2010).

³⁷ Grosberg, *supra* note 7, at 503–04.

³⁸ Jay Romano, *Your Home: Co-op Cases Are Getting Own Court*, N.Y. TIMES, Oct. 26, 1997, § 11, at 3.

³⁹ Jay Romano, *Your Home: Reducing Legal Costs in a Co-op*, N.Y. TIMES, Aug. 18, 1996, § 9, at 2.

include the lawsuits that residents filed.⁴⁰ In fact, the number of common interest development disputes has risen faster than the overall number of residents in such developments.⁴¹

Commentators have described this spike in litigation as inevitable, given the tight quarters in common interest developments.⁴² The close proximity of neighbors is often the catalyst for what have been described as “quality of life” disputes,⁴³ which usually involve things such as noise, odors, pet issues, use of common areas, and personal disputes among tenants. Although these disputes usually involve little or no money, they spark deep resentment and strife between the parties. While similar issues arise in residential rental buildings, condo and co-op dwellers have an ownership interest and usually react more strongly.⁴⁴ People are much more committed to “preserving the physical as well as aesthetic desirability of their homes when they own them, as opposed to when they rent them.”⁴⁵ Accordingly, common interest owners manifest great care and concern for their units because they have a large emotional and financial interest.

Quality of life conflicts usually arise in one of two ways. The first type of dispute is between neighbors and often develops when one neighbor is doing, or not doing, something that affects the other neighbor. Loud music or second-hand smoke can turn an occasional irritation into an unbearable daily annoyance. Moreover, the daily contact between neighbors in condos and co-ops exacerbates this disharmony.

⁴⁰ See *id.* (quoting attorney Bruce Cholt, who describes a co-op where “one shareholder filed no fewer than 12 lawsuits”).

⁴¹ *Id.*

⁴² See Grosberg, *supra* note 7.

⁴³ See, e.g., Richard Siegler, *Cooperatives and Condominiums: Alternative Dispute Resolution*, N.Y.L.J., Sept. 3, 1997, at 3 (containing a sample mediation clause for condos and co-ops that defines a “‘quality of life’ issue [as] any nonmonetary issue”).

⁴⁴ See Romano, *supra* note 38 (“[T]here is a fundamental difference between disputes in co-ops and those in rental buildings In co-ops, the tenants are also the owners. And a judge can’t just apply landlord-tenant law . . . without thinking about that difference.” (quoting Marc Luxemburg, a New York attorney and President of the Council of New York Cooperatives)).

⁴⁵ Grosberg, *supra* note 7, at 505 (discussing the various reasons why there is a higher number of disputes between condo and co-op owners than other neighbors and noting the change in status from renter to homeowner as one such reason).

Second, quality of life disputes arise when a condo or co-op owner has acted, or wants to act, in a manner that violates the development's rules and regulations.⁴⁶ Most people never read the covenants, conditions, and restrictions ("restrictions") that govern common interest developments.⁴⁷ Conflicts often erupt when condo or co-op owners discover that there are restrictions on their use of their property.⁴⁸ Although the types of restrictions vary, they usually cover issues such as parking, pet ownership, use of recreational facilities, and subleasing.⁴⁹ The owner of a unit in a common interest development has less control over his property than the owner of a typical single family house.⁵⁰ The restrictions can seem arbitrary and paternalistic to owners who feel that the unit is their property and that they should be entitled to do with it as they please. Additionally, disputes can occur because these restrictions are often dated and may not comply with new laws—for example, anti-smoking or recycling regulations.⁵¹ Also, ambiguously drafted rules may cause conflict because tenants are unsure of whether certain behaviors are prohibited.⁵² Condo and co-op owners who obey the rules may also resent other owners who are not complying with the restrictions but go unpunished.⁵³ This may encourage some other owners to disregard the restrictions and, thereby, create friction with the board.

⁴⁶ See *Alternative Dispute Resolution in Common Interest Developments*, 33 CAL. L. REVISION COMM'N REPORTS 689, 694 (2003), available at <http://www.clrc.ca.gov/pub/Printed-Reports/REC-CID-ADR.pdf> (stating that covenants, conditions, and restrictions "inevitably lead[] to conflicts").

⁴⁷ See Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. REV. 1, 1 (1995) ("Only after [owners] have moved in and settled down do they discover that the development declaration contains a host of intrusive restrictions affecting their daily lives . . .").

⁴⁸ See Mollen, *supra* note 3, at 79 n.14 (citing Patrick J. Rohan, *Cooperative Housing: An Appraisal of Residential Controls and Enforcement Procedures*, 18 STAN. L. REV. 1323, 1323 (1966)) (suggesting that purchasers should be warned in advance of restrictions that may limit their rights as individual owners).

⁴⁹ See generally Realtor.com, What About the CC&Rs?, <http://www.realtor.com/BASICS/condos/ccr.asp?poe=realtor> (last visited Oct. 30, 2010) (describing covenants, conditions, and restrictions in condos).

⁵⁰ See Grosberg, *supra* note 7.

⁵¹ See Martin Librett, *Change is Good!: Updating House Rules Helps Avoid Conflicts*, COOPERATOR: CO-OP & CONDO MONTHLY, Oct. 1995, available at <http://cooperator.com/articles/307/1/Change-is-Good/Page1.html>.

⁵² *Id.*

⁵³ Grosberg, *supra* note 7, at 504–05.

Aside from quality of life issues, another source of potential conflict in common interest developments are financial disputes involving such things as maintenance fees, common charges, and special assessments.⁵⁴ The owners and the board members may disagree over who is responsible for certain fees and repairs. Relatively minor monetary disputes can spiral out of control and result in protracted litigation.⁵⁵ Financial disputes may also relate to the common interest development's restrictions. Such disputes occur when owners feel that they are paying either (1) common charges for a problem that does not affect them or that they did not cause, or (2) for problems that directly affect them that they feel are the responsibility of the whole common interest development, as opposed to just one individual owner.

Another source of disputes unique to co-ops is that the board has the power to deny a unit to any potential buyer, so long as the decision is not based on race, creed, religion, or other constitutionally prohibited criteria.⁵⁶ This exercise of the board's seemingly arbitrary powers may engender animosity.⁵⁷ A situation may arise where a unit owner wants to sell his co-op quickly, but the sale is blocked by the board with little or no explanation. A unit owner may also lose a desirable selling price because of board refusal. Furthermore, the co-op owner may be unable to purchase a new home because the delay or failure of the board to approve the sale of his co-op prevents him from closing on his new property.

Finally, conflicts between owners and the board may arise because the board is comprised of individuals who are not professional property managers. The board in common interest developments is comprised of unit owners who generally lack experience in managing property.⁵⁸ One commentator noted that board members "come from varied backgrounds and experiences, few of which prepare them for their job: the management of a

⁵⁴ See *Alternative Dispute Resolution in Common Interest Developments*, *supra* note 46.

⁵⁵ See, e.g., Mary Voboril, *How \$909 Spat Cost \$100,000 in Legal Fees*, *NEWSDAY*, Mar. 6, 1994, at 20 (describing how a minor dispute involving the installation of window guards ultimately led to \$100,000 in attorneys fees).

⁵⁶ See *Weisner v. 791 Park Ave. Corp.*, 6 N.Y.2d 426, 434, 160 N.E.2d 720, 724, 190 N.Y.S.2d 70, 75 (1959).

⁵⁷ See Grosberg, *supra* note 7, at 505.

⁵⁸ See James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 *SANTA CLARA L. REV.* 1135, 1144 (1998).

complex, multimillion dollar property.”⁵⁹ This lack of experience and professional expertise may perpetuate conflicts with unit owners because the occupants may be less willing to accept the board member’s authority. Also, a board composed of laypeople is more likely to make legal mistake or violate procedures set forth in the bylaws.⁶⁰ Similarly, a unit owner is more likely to question the decision of a board member with no prior real estate experience than the decisions of a professional owner.⁶¹ Therefore, board members’ lack of professional expertise may contribute to conflicts in common interest developments.

III. RESOLVING CONFLICTS IN COMMON INTEREST DEVELOPMENTS

Litigation is often an unrealistic solution to relatively minor disputes that can arise in condos or co-ops. When disputes erupt between neighbors regarding noise, foul odors, or other quality of life matters, it is usually cost prohibitive for the aggrieved party to bring a lawsuit. Even in small claims court, the cost of filing the lawsuit, missing time from work, and traveling to and from the court house dissuades individuals from bringing the dispute to court. For cases not in small claims court, a party must also incur the cost of an attorney, an additional barrier that makes the prospect of litigation even more daunting. For these reasons, ADR is particularly well-suited to resolve minor issues in condos and co-ops. Mediation in particular can help bring about just results in a cost effective manner.

A. *Weaknesses of Litigation for Resolving Disputes in Condos and Co-ops*

There are several reasons why litigation is not the most effective means of resolving disputes in common interest developments. The most compelling reason is the cost of litigation. Acknowledging the high cost of litigation, the famous French philosopher Voltaire commented, “I was never ruined but

⁵⁹ Elisha & Wiltgen, *supra* note 9, at 14.

⁶⁰ *Alternative Dispute Resolution in Common Interest Developments*, *supra* note 46, at 693.

⁶¹ Mollen, *supra* note 3, at 81; *see also* Grosberg, *supra* note 7, at 506; Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303, 379 (2006) (suggesting that common interest developments may hire professional board members to aid the board in policy decisions).

twice; once when I lost a lawsuit and once when I won one.”⁶² Litigation can be a very expensive process, especially if a party has to pay an attorney by the hour. Because condo and co-op disputes do not usually involve dollar amounts that justify residents hiring attorneys on a contingency fee basis, the cost of litigation makes “the courts inaccessible to large sections of the poor and middle class.”⁶³ This is particularly true when the source of the controversy is quality of life issues. In one particularly egregious and infamous case, a unit owner and the board argued over who bore the responsibility to install window guards at a cost of \$909; \$100,000 in combined legal fees later, the controversy was resolved.⁶⁴ One co-op owner involved in the dispute recognized that “[a]nything you can possibly do to avoid a lawsuit, do it.”⁶⁵ It is almost axiomatic in condo and co-op disputes that the “cost of litigation necessary to resolve these disputes is often disproportionate to the character of the dispute.”⁶⁶ For this reason, litigation should be the last resort for condo and co-op residents. Unfortunately, the prospect of high litigation expenses causes many legitimate grievances to go unresolved. In these cases, truly wronged parties suffer solely for want of an effective method of achieving relief.⁶⁷

Neither party’s interests are served by high legal bills in a dispute involving little or no money. Individual owners are particularly affected by the high cost of litigation because they have to bear the full cost themselves. In contrast, the board can spread the cost among unit owners in the form of a special assessment charge and, therefore, may be more aggressive in pursuing litigation.⁶⁸ It should be noted, however, that the

⁶² AN EDITOR’S TREASURY: A CONTINUING ANTHOLOGY OF PROSE, VERSE, AND LITERARY CURIOSA 1032 (Herbert R. Mayes ed., 1968).

⁶³ ALAN SCOTT RAU ET AL., NEGOTIATION 22 (3d ed. 2006).

⁶⁴ See Voboril, *supra* note 55.

⁶⁵ Wade Lambert, *Ever Hear the One About the Lawyers and the Window Bars?*, WALL ST. J., Mar. 23, 1994, at A1.

⁶⁶ *Alternative Dispute Resolution in Common Interest Developments*, *supra* note 46, at 695.

⁶⁷ See Nathan K. DeDino, Note, *When Fences Aren’t Enough: The Use of Alternative Dispute Resolution to Resolve Disputes Between Neighbors*, 18 OHIO ST. J. ON DISP. RESOL. 887, 890–91 (2003).

⁶⁸ See *Alternative Dispute Resolution in Common Interest Developments*, *supra* note 46, at 695–96 (noting that the owner involved in the dispute is forced to partially fund the board’s litigation through assessments that apply to all owners).

“highest component of any co-op’s legal expenses is litigation.”⁶⁹ Legal fees quickly mount as time passes, and both parties become entrenched in their position. Discovery devices and motion practice are often used as weapons to drive up the other side’s costs to force a settlement. When the costs of appeals are added on, it is easy to see how litigation expenses can spiral out of control, especially when parties become irrationally entrenched in their positions.

Another weakness of litigation is the time it takes to get a final ruling. From pleadings through final appeals, the legal process compares to watching paint dry: slow and tedious. Lawsuits can take several years or even a decade from start to finish. This problem is even more pronounced in courts that allow interlocutory appeals, as these appeals add significant time to the process.⁷⁰ Additionally, in many jurisdictions, the judicial system is congested and overcrowded, and cases take significant time to be resolved.⁷¹ Court congestion is doubly problematic because (1) it delays hearings for substantial periods of time, and (2) when those hearings actually occur, they are often rushed to accommodate the hundred or more other cases that judges have on their calendars.⁷² Even when litigation can solve an owner’s problems, the long wait to resolve a noise or odor dispute is far from ideal.

Litigation also lacks flexibility in the sense that parties cannot choose who will ultimately settle their dispute. The parties must give over their control of the outcome to a judge or jury. The parties do not get the luxury of choosing what judge they want and at most get a minimal amount of say over what jurors will serve if the case progresses to a jury trial.⁷³ One

⁶⁹ Romano, *supra* note 39 (quoting Bruce Cholst, a Manhattan attorney who focuses on condominium law).

⁷⁰ See, e.g., *Johnson v. Jones*, 515 U.S. 304, 309 (1995) (observing that an interlocutory appeal “can threaten [court] proceedings with delay [and] add[ed] costs”).

⁷¹ See generally Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 813–14 (2000) (discussing the congestion in civil courts and analyzing obstacles to reform).

⁷² See Mollen, *supra* note 3, at 86–87.

⁷³ See Jay Romano, *Mediation an Option for Housing Disputes*, N.Y. TIMES, Nov. 5, 2006, § 11, at 10 (citing Daniel Weitz, Chairman of the New York City Bar Association Committee on Alternative Dispute Resolution, who noted that one of the major drawbacks to litigation is that “the parties surrender control of the outcome to a judge or jury”).

commentator noted that in litigation: “the judge may be fully versed in the law but not necessarily the nuances of the field.”⁷⁴ Furthermore, neither a judge in a bench trial nor a jury has any specialized knowledge in the area under which the dispute arose. Most judges also do not have the time to adequately familiarize themselves with the facts of the case or the context under which the dispute arose.⁷⁵ Judges or juries cannot achieve a level of expertise—that is available when parties appoint their own decisionmakers—in areas such as “law, economic issues, and practical ramifications relating to the condo-co-op context.”⁷⁶ The time and effort needed to educate a decisionmaker about the context in which the dispute arose contributes to the cost of litigation.⁷⁷

Furthermore, the judicial system is limited in the relief that it can provide and its ability to craft solutions that benefit both parties. When litigation finishes, there is always a “winner” and a “loser.”⁷⁸ Even for the winner, litigation can result in a Pyrrhic victory because of the time, cost, and an unsatisfying resolution. Because courts are bound to follow statutes and precedents, they may be unable to craft equitable and appropriate relief for the parties.⁷⁹ In a lawsuit, both sides must operate within the formalistic framework of legal procedure to prove their case. The relief afforded in litigation can also be inadequate in circumstances where relevant, but inadmissible, evidence is not

⁷⁴ Liz Lent, *A Guide to Alternative Dispute Resolution: Finding a Better Solution*, THE COOPERATOR: THE CO-OP & CONDO MONTHLY, Oct. 2007, available at <http://www.cooperator.com/articles/1510/1/A-Guide-to-Alternative-Dispute-Resolution/Page1.html>.

⁷⁵ See *id.*

⁷⁶ Mollen, *supra* note 3, at 87. But see Romano, *supra* note 38 (detailing New York’s creation of a special court to deal with condo and co-op disputes. Judith Kaye, Chief Judge of the New York Court of Appeals, stated that “[t]he idea is to allow the judges . . . to have a special area of law they can focus on.”).

⁷⁷ See Walter D. Goldsmith, *Arbitration Law: Cooperative and Condominium Disputes*, N.Y.L.J., Oct. 21, 1994, at 3.

⁷⁸ See Jeffrey Krivis, *Benefits of Mediation: High Success Rate, Low Cost*, CORP. COUNSELLOR, Oct. 1994, available at <http://www.firstmediation.com/resources/?p=16>.

⁷⁹ See 2 PATRICK J. ROHAN & MELVIN A. RESKIN, *REAL ESTATE TRANSACTIONS: COOPERATIVE HOUSING LAW AND PRACTICE—FORMS* § 11.10, at 11-26 (2010); see also Jay Romano, *Your Home: Mediation Instead of Litigation*, N.Y. TIMES, Feb. 15, 1998, § 11, at 3 (“[T]here’s a category of cases out there that can never get righted in a courtroom When cases like that end up in court everybody loses.” (quoting Richard Nardi, Chairman of the New York City Bar Association Committee on Cooperative and Condominium Law)).

taken into account by the trier of fact.⁸⁰ Conversely, limitations in the substantive law may force a party to seek relief that is greater in scope than actually desired.⁸¹ Some courts have called litigation “overkill” when it develops because of a minor common interest development dispute.⁸² The court normally has three options when granting relief: (1) it can award monetary damages, (2) grant a permanent injunction, or (3) compel a party to carry out specific performance of its contractual duties. Yet a court can grant specific performance or an injunction only when a party demonstrates that monetary damages would be inadequate.⁸³ This is often very difficult or impossible to prove.⁸⁴ Therefore, litigation usually results in solutions that are defined by either either statutory law or common law as opposed to the needs of the parties involved.⁸⁵

Another shortfall of litigation in the condo and co-op context is the public nature of litigation.⁸⁶ Litigation allows fellow unit owners, friends, business associates, and others to learn details of a dispute that may be personal and potentially embarrassing.⁸⁷

⁸⁰ See N.Y. CITY BAR, *MEDIATE (DON'T LITIGATE) YOUR CO-OP/CONDO RESIDENTIAL DISPUTE 4*, available at http://www.nycbar.org/pdf/Mediate%28Don%27t%20Litigate%29_brochure.pdf (noting that mediation allows the parties to “tell their whole story,” instead of a judge or jury who decides a case based on the admitted evidence).

⁸¹ See DeDino, *supra* note 67, at 894 (discussing two cases where plaintiffs were forced to seek remedies that were disproportionate to the problems they were facing because those were the only remedies available); see also Press Release, N.Y. City Bar Ass'n, Co-Op & Condo Mediation Project: A New Public Service for Resolving Disputes (Oct. 11, 1996), http://www.nycbar.org/PressRoom/PressRelease/2006_1019.htm (describing litigation in condos and co-ops as “heavy-handed”).

⁸² See 1 PATRICK J. ROHAN & MELVIN A. RESKIN, *REAL ESTATE TRANSACTIONS: CONDOMINIUM LAW AND PRACTICE—FORMS* § 43.05[5][a] (2010) (citing *Kirou v. Oceanside Plaza Condo. Ass'n*, 425 So. 2d 650 (Fla. Dist. Ct. App. 1983), where the court chided the plaintiff for wasting an overburdened court's time with the trivial matters in a case involving dogs “disgrac[ing]” themselves in common areas); see also *Tower Forty-One Ass'n v. Levitt*, 426 So. 2d 1290 (Fla. Dist. Ct. App. 1983).

⁸³ See RESTATEMENT (SECOND) OF CONTRACTS §§ 357–69 (1981).

⁸⁴ See, e.g., Jenny R. Turner, *Preinvention Assignment Agreement Breach: A Practical Alternative to Specific Performance or Unqualified Injunction*, 5 J. INTELL. PROP. L. 631, 642 (1998).

⁸⁵ See Lent, *supra* note 74.

⁸⁶ See *MEDIATE (DON'T LITIGATE) YOUR CO-OP/CONDO RESIDENTIAL DISPUTE*, *supra* note 80.

⁸⁷ See Mollen, *supra* note 3, at 89; see also ALT. DISPUTE RESOLUTION COMM. & COMM. ON ARBITRATION, ASS'N OF THE BAR OF THE CITY OF N.Y., *ALTERNATIVE DISPUTE RESOLUTION: HOW TO RESOLVE YOUR DISPUTE WITHOUT GOING TO COURT 2* (1996) [hereinafter *HOW TO RESOLVE YOUR DISPUTE WITHOUT GOING TO COURT*], available at <http://www.abcnny.org/Publications/ADR.htm>.

The Internet makes legal papers readily accessible to anyone who is inclined to investigate a dispute. The exposure of these litigation details could have negative business consequences as well. For example, parties to a business transaction often run background checks on one another.⁸⁸ These background checks reveal any past or pending litigation, and the existence of litigation may be interpreted as a sign of strife in the common interest development and negatively impact its value.⁸⁹ Moreover, a resident who wants to sell his co-op and move into a new one may find the new co-op board reluctant to approve his purchase because they view him as litigious.⁹⁰ The board members themselves may have similar problems if they are named individually as defendants in a lawsuit.⁹¹

Furthermore, litigation in common interest developments may reduce the value of all units by highlighting the building's structural or operational problems.⁹² Potential purchasers may avoid a building that is embroiled in a lawsuit because they fear the board will levy a special assessment to fund the litigation.⁹³ Lawsuits may also draw the attention of regulatory agencies, which can conduct inspections and force the development to make expensive repairs. These repairs would require more special assessments and would also necessitate construction in the building, as well as the temporary chaos that accompanies it.⁹⁴

The publicity accompanying a dispute may also further entrench the parties in their respective positions. The board does not want to appear weak because it wants to discourage future litigation. Likewise, residents may be unwilling to compromise for fear that others will perceive them as a rabble-rouser lest they are vindicated with a victory in court. This same mentality may apply in a dispute between two neighbors, as both want to save face if their dispute becomes a matter of public knowledge.

⁸⁸ See Mollen, *supra* note 3, at 89.

⁸⁹ *Id.*; see also 1 ROHAN & RESKIN, *supra* note 82, at § 54.05[5] (noting that the value of condominiums with "a reputation for disputes and turmoil" is negatively impacted).

⁹⁰ See Romano, *supra* note 39 (quoting Bruce Cholst, a Manhattan condo and co-op attorney).

⁹¹ See Mollen, *supra* note 3, at 90.

⁹² *Id.* at 89.

⁹³ *Id.* at 89–90.

⁹⁴ *Id.*

Therefore, the public nature of litigation creates a litany of issues that contribute to the overall shortcomings of litigation as a tool to resolve disputes in common interest developments.

Finally, litigation in common interest developments can lead to long lasting animosity among residents or between residents and board members. Unlike other types of lawsuits, litigation in condo and co-op disputes involves two parties who are going to have to see each other on a regular basis.⁹⁵ This can lead to a hostile environment not only for the disputants but also for the other unit owners. Litigation is a contentious process, and attorneys do not usually consider the longterm ramifications of the battle. The litigation process is not well suited to deal with disputes among parties with close relationships.⁹⁶ Lawyers are trained to zealously and vigorously represent their clients in disputes, but this mentality may permanently ruin relationships. A person who misses work, pays for an attorney, and devotes his free time to dealing with litigation will naturally come to resent the other party in the case.⁹⁷ The more money and time spent on litigation, the more hostility that develops between the parties.⁹⁸

The negative impact of litigation is clearly illustrated in *360 Owners Corp. v. Diacou*, where, in a dispute over who was responsible for paying \$909 to install window guards, the court awarded the board \$30,000 in legal fees; the remaining \$43,000 in fees was to be collected through a special assessment on the co-op share owners.⁹⁹ One can imagine how the other unit owners felt towards the resident who sued the board upon receiving an assessment for their share of the legal bill. One commentator noted that “[t]o the community and individuals involved . . . these disputes may be a festering sore that needs to be dealt with quickly and effectively to ensure a healthily functioning community.”¹⁰⁰ For the foregoing reasons, litigation is certainly not the best method to resolve disputes between parties who will have a continued relationship after the dispute is concluded.

⁹⁵ See Grosberg, *supra* note 7, at 506.

⁹⁶ See DeDino, *supra* note 67, at 897.

⁹⁷ See Mollen, *supra* note 3, at 88.

⁹⁸ *Id.*

⁹⁹ See Lambert, *supra* note 65; see also *Counsel Is Awarded \$30,000 Fee in Battle Over \$900 Co-op Windows*, N.Y.L.J., Feb. 23, 1994, at 21.

¹⁰⁰ 1 ROHAN & RESKIN, *supra* note 82.

B. Use of Arbitration in Condo and Co-op Disputes

ADR offers an effective substitute for litigation. One method of ADR that a condo or co-op board should consider is arbitration. Simply put, “[a]rbitration is the submission of a dispute to one or more impartial persons for a final and binding decision, known as an ‘award.’”¹⁰¹ Arbitration can be either a formal or an informal process. Formal arbitration includes matters submitted before the Arbitration Association of America or the Judicial Arbitration and Mediation Services (“JAMS”). These associations have well defined guidelines and rules that govern arbitrations before them.¹⁰² In the context of common interest developments, informal arbitration can include disputes between neighbors that are arbitrated by the condo or co-op board or disputes that are submitted to community justice centers.¹⁰³

Arbitration can either be binding or nonbinding on the parties. If arbitration is binding, the parties have very limited rights of appeal. Arbitration can be implemented in three ways: (1) the board can modify the common interest developments rules or bylaws to require arbitration;¹⁰⁴ (2) the parties to a dispute can voluntarily agree to submit their dispute to arbitration;¹⁰⁵ or (3) arbitration may be required in some states for condo and co-op disputes. Arbitration has several benefits over litigation. There are, however, several limitations that should also be considered.

The chief benefit of arbitration over litigation is that it reduces costs in a variety of ways. The cost of arbitrating common interest disputes involving quality of life issues is comparatively low because the cost of arbitration is relative to

¹⁰¹ American Arbitration Association, Arbitration, http://www.adr.org/arb_med (last visited Nov. 1, 2010).

¹⁰² For the JAMS alternative dispute resolution rules, see JAMS Comprehensive Arbitration Rules & Procedures, <http://www.jamsadr.com/rules/rules.asp> (last visited Nov. 1, 2010). The American Arbitration Association's rules are available at <http://www.adr.org/sp.asp?id=28749> (last visited Nov. 1, 2010).

¹⁰³ For a discussion of the virtues of Community Justice Centers, see DeDino, *supra* note 67, at 904–05.

¹⁰⁴ See Librett, *supra* note 51.

¹⁰⁵ Romano, *supra* note 39.

the amount of money in controversy.¹⁰⁶ Even if a party refuses to compromise, the case can still be decided at a fraction of the time and cost.¹⁰⁷

Another reason that costs are lower in arbitration is that disputes are resolved quicker.¹⁰⁸ This advantage is highlighted in one case where an arbitration involving hundreds of millions of dollars was resolved within six months.¹⁰⁹ The disputes in common interest developments are normally small and could be decided even faster than a multimillion dollar dispute. The arbitrator's ability to fix a hearing schedule that cannot be altered also helps eliminate unnecessary delays.¹¹⁰ This prevents the parties from delaying the case to increase arbitration costs and force an unfair settlement. The faster a dispute is settled, the less money is spent on attorney fees and other litigation related expenses. Therefore, the speed of arbitration enhances its cost effectiveness.

Furthermore, arbitration is a cost effective alternative to litigation because it does not have litigation's rigid procedural formalities. For example, arbitration is typically commenced by a party writing a simple demand for arbitration, as opposed to filing a complex summons and complaint.¹¹¹ These less formal procedural rules again help lower costs because they allow attorneys to spend less time dealing with procedural hurdles and more time focusing on substantive matters. Allowing the attorneys to concentrate on substance enables them to more effectively evaluate their client's position and possibly encourage the parties to settle.

By streamlining these procedural aspects, arbitration is more likely to arrive at a result based on the merits of the dispute, as opposed to a result based on technical procedural points. If the parties wish to apply specific procedural rules, they

¹⁰⁶ See Jay Romano, *Your Home: Intervening to Resolve Disputes*, N.Y. TIMES, Sept. 8, 2002, § 11, at 5.

¹⁰⁷ See Abigail Pessen, Letter to the Editor, *Choosing Mediation over Arbitration*, N.Y. TIMES, Dec. 31, 2000, § 11, at 8 (noting that arbitration is very similar to litigation, except it is cheaper and faster).

¹⁰⁸ See Irwin Kahn, *Alternative Dispute Resolution: A Win-Win Proposition*, 28 NYSBA ONE ON ONE 1, 9 (Summer/Fall 2007).

¹⁰⁹ Claudia H. Deutsch, *Bank Buying the Building Named for It*, N.Y. TIMES, June 1, 1994, at 4D.

¹¹⁰ Goldsmith, *supra* note 77.

¹¹¹ Romano, *supra* note 106.

are free to stipulate to these rules in the arbitration agreement.¹¹² The lack of procedural formality also reduces costs by diminishing or eliminating the need for an attorney, especially in relatively minor quality of life disputes.¹¹³ Therefore, a party with less money is at less of a disadvantage in an arbitration proceeding.¹¹⁴

Arbitration is also less contentious than litigation because the formal rules of evidence do not apply, unless the parties agree otherwise.¹¹⁵ Although arbitrators are typically guided by the rules of evidence, they are allowed to consider any material they deem proper.¹¹⁶ In fact, if an arbitrator refuses to admit relevant evidence, the award may be reversed on appeal. Therefore, arbitrators tend to admit less reliable forms of evidence and weigh the value of the evidence accordingly.¹¹⁷ For example, arbitrators routinely allow evidence in the form of affidavits that would be inadmissible as hearsay in litigation.¹¹⁸ These less formal evidentiary standards allow a party to express his feelings regarding the dispute, which would clearly not be admissible under the normal rules of evidence applicable in litigation.¹¹⁹ By allowing parties to vent their frustrations and feelings to an arbitrator, arbitration provides a form of cathartic relief. This may encourage settlement or, at the very least, give the parties greater satisfaction in the outcome of the arbitration because each party was allowed to “fully” present his side of the dispute.

¹¹² Mollen, *supra* note 3, at 92.

¹¹³ Siegler, *supra* note 43.

¹¹⁴ ALTERNATIVE DISPUTE RESOLUTION: HOW TO RESOLVE YOUR DISPUTE WITHOUT GOING TO COURT, *supra* note 87.

¹¹⁵ 1 JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION § 8:60, at 196 (3d ed. 2005).

¹¹⁶ *Id.*

¹¹⁷ *Id.* § 8:61, at 196–97; *see also* ALAN SCOTT RAU ET AL., ARBITRATION 274 (4th ed. 2006) (“An arbitrator is . . . more likely to get into trouble by following the rules of evidence than by ignoring them—and far more likely to get into trouble by excluding evidence than by admitting it.”).

¹¹⁸ RAU ET AL., *supra* note 117, at 273; *see also* 1 GRENIG, *supra* note 115, § 8:61, at 196.

¹¹⁹ 1 GRENIG, *supra* note 115, § 8:61, at 196; *see also* DWIGHT GOLANN & JAY FOLBERG, MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL 197 (2006) (“Highly emotional disputants, especially at the outset of a case, may need time to work through their feelings.”).

Furthermore, arbitration is a cheaper alternative to litigation because discovery in arbitration is very limited.¹²⁰ Discovery is often inconsistent with the goals of arbitration because it is frequently the most costly and prolonged element of a trial.¹²¹ Discovery in arbitration is less burdensome because arbitrators themselves can subpoena witnesses and documents that are necessary to make a final determination.¹²² When the arbitrator requests that a party produce evidence, the party will usually comply because a refusal could antagonize the arbitrator and hurt their case.¹²³ Therefore, arbitration retains the necessary aspects of discovery and allows an arbitrator to limit or prevent discovery that is abusive, costly, or time consuming. The limits on discovery in arbitration prevent an additional "layer of complexity and 'legalism'" associated with litigation.¹²⁴ Once again, this may allow a party to forego hiring an attorney in relatively minor disputes, thereby further reducing the party's overall costs.

Privacy is arbitration's other major advantage over litigation. In many instances the parties' motivation for choosing arbitration is the privacy that it affords.¹²⁵ In arbitration, neither the public nor the media are allowed to attend hearings or view the records.¹²⁶ Moreover, there are usually no published opinions of the arbitrator's final determination.¹²⁷ Arbitration may, therefore, avoid costly damage to the parties' reputations.¹²⁸ The parties' business reputations are spared because they avoid

¹²⁰ See Jerold S. Solovy & Robert L. Byman, *Arbitration Discovery*, NAT'L L.J., Sept. 8, 2003, at 24.

¹²¹ 1 GRENIG, *supra* note 115, § 8:20, at 184; *see also* RAU ET AL., *supra* note 117, at 280.

¹²² See UNIF. ARBITRATION ACT, § 7, 7 U.L.A. 1 (Supp. 1999), *available at* <http://www.adr.org/sp.asp?id=29567&printable=true>; *see also* 9 U.S.C. § 7 (2006).

¹²³ See RAU ET AL., *supra* note 117, at 280.

¹²⁴ *Id.* at 282.

¹²⁵ Edward J. Costello Jr., *Whether and When To Use Alternative Dispute Resolution*, in *ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR'S HANDBOOK* 17, 23 (Nancy F. Atlas et al. eds., 2000) [hereinafter *THE LITIGATOR'S HANDBOOK*]; *see also* Justin M. Goldstein & Cassandra L. Seto, *Keeping Private Arbitration Private*, L.A. LAWYER, Feb. 2008, at 12.

¹²⁶ Costello, *supra* note 125.

¹²⁷ Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1216 (2006).

¹²⁸ *Id.* at 1212.

the stigma of litigiousness.¹²⁹ Similarly, the parties' personal reputations are spared the embarrassment of private information being exposed to the public.¹³⁰

Private arbitrations also facilitate settlements because the parties do not have to worry about appearing "weak" to their neighbors. The common interest development's board can avoid setting negative legal precedent. This way, other neighbors cannot rely on the arbitration result or settlement in similar disputes. Realistically, a board may be willing to compromise in one isolated instance but unwilling to reach a similar agreement if it appears to be a trend in the development. The common interest development residents, however, no longer have to worry about seeming weak in the eyes of their neighbors. Because arbitration allows parties to settle their disputes privately, it gives residents an opportunity to compromise and still save face.¹³¹

It is important to note that there is a distinction between "privacy" and "confidentiality" in arbitration.¹³² Although arbitration proceedings are not open to the public, parties to the arbitration are not necessarily prevented from disclosing what goes on during the course of the proceeding. Absent an express agreement, there is no presumption of confidentiality.¹³³ Therefore, the parties may want to enter into a confidentiality agreement. Yet either party may still end up in court attempting to have the arbitration award enforced or overturned.¹³⁴ In this case, one or both of the parties may make a motion to have the court records sealed.¹³⁵ Although this provides a solution to the confidentiality problem, having the records sealed is a difficult process, and a court may seal some documents but not others.¹³⁶

¹²⁹ See, e.g., Mollen, *supra* note 3, at 89–90 (discussing the damage to one's business reputation that can result from the publicity associated with litigation).

¹³⁰ See *id.* at 90.

¹³¹ See Schmitz, *supra* note 127, at 1222–23.

¹³² *Id.* at 1214–21; see also Goldstein & Seto, *supra* note 125, at 12–14 (noting the limits of privacy in arbitration and the potential for the results of arbitration proceedings to become public).

¹³³ See Anjanette H. Raymond, *Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?*, 16 AM. REV. INT'L ARB. 479, 493–95 (2005).

¹³⁴ Goldstein & Seto, *supra* note 125.

¹³⁵ *Id.* at 14.

¹³⁶ *Id.* (explaining the standard to have a record sealed, and noting that "[s]ealing orders must be narrowly tailored").

Another significant benefit of arbitration over litigation is the ability to select arbitrators with expertise and specialized knowledge.¹³⁷ By choosing arbitrators with knowledge in the area of the dispute, the parties can save time and money because they do not have to educate the decisionmaker.¹³⁸ In fact, depending on the arbitration agreement, the parties may be able to choose an arbitrator who is familiar with the facts of the case before the arbitration begins.¹³⁹ This may be particularly effective in small quality of life disputes where the money involved is miniscule, but the emotional climate between the parties is very heated. By using an arbitrator who is already familiar with the dispute, the parties can avoid unnecessary expense in educating the arbitrator about the nuances of the case. Despite the benefits of selecting an arbitrator who is already familiar with the case, selecting an arbitrator who knows one or both parties beforehand may ultimately increase animosity between the parties, because the losing party may believe the outcome was biased and not based on the merits.

Parties may also get a greater sense of justice when a dispute is decided by an expert rather than a judge or jury. A party may view the judge and jury members as laypeople who do not completely understand the issues. On the other hand, there is still the potential that residents will view the process as "fixed" if an arbitrator's professional background makes the arbitrator appear more sympathetic to the board or another neighbor. For example, in a dispute over whether a certain activity is allowed under the common interest development's restrictions, if the arbitrator has a background in real estate law, the resident may view the arbitration award as one made by an "insider," whose natural tendency is to rule in favor of the board.

Another benefit of using arbitration over litigation is that, generally, there is no right to appeal an arbitrator's decision. When parties agree that arbitration will be binding, arbitration reduces cost by severely limiting the right of appeal.¹⁴⁰ A binding arbitration award can only be overturned if it "was procured by corruption, fraud or other undue means," or . . . the arbitrator displayed various forms of misconduct including 'exceeding their

¹³⁷ See 1 GRENIG, *supra* note 115, § 7:43, at 172.

¹³⁸ See Librett, *supra* note 51.

¹³⁹ Siegler, *supra* note 43.

¹⁴⁰ 1 ROHAN & RESKIN, *supra* note 82, § 43.05[5][a].

powers,' 'refusing to postpone the hearing upon sufficient cause shown,' or 'refusing to hear evidence material to the controversy.'¹⁴¹ The grounds for overturning an arbitration award on appeal have been described as "extremely limited" and "arbitration awards are seldom challenged and very rarely overturned."¹⁴² In some instances, the finality of binding arbitration can also stimulate settlement between the parties because one party may be less willing to take a chance with an arbitrator whose decision cannot be challenged.¹⁴³ Generally, however, arbitrations are settled much less frequently than litigation.¹⁴⁴ A limited right of appeal can be desirable in common interest development disputes because it creates speedy and certain results while preventing smaller value disputes from blossoming into costly litigation that engenders permanent animosity between the parties.

A final advantage of arbitration is that it allows for more flexible results than litigation. As discussed above, courts are very limited in the relief that they can grant. In arbitration, on the other hand, an arbitrator has much more leeway in crafting the relief.¹⁴⁵ The federal standard for arbitration is that the "remedy must 'draw its essence' from the underlying agreement that authorizes the arbitration."¹⁴⁶ Also, "[a]rbitrators have the power to render such relief as is appropriate to the dispute submitted to them as long as the relief does not offend public policy or require a result contrary to statute."¹⁴⁷ Therefore, as long as arbitrators do not stray too far from the wording of the arbitration agreement and applicable law, they can reach solutions that are more equitable than those available in court.

¹⁴¹ Alvin I. Apfelberg, *Laying Down the Law: Mediation-Arbitration v. Litigation*, COOPERATOR: THE CO-OP & CONDO MONTHLY, June 2000, available at <http://www.cooperator.com/articles/537/1/Laying-Down-the-Law/Page1.html>.

¹⁴² Goldsmith, *supra* note 77.

¹⁴³ *Id.*

¹⁴⁴ Harold D. Field, Jr. & John J. Upchurch, *Preparation for and Presentation During Alternative Dispute Resolution*, in THE LITIGATOR'S HANDBOOK, *supra* note 125, at 69, 70 (Nancy F. Atlas et al. eds., 2000).

¹⁴⁵ Costello, *supra* note 125, at 22.

¹⁴⁶ *Id.* at 33 n.1 (quoting *Steel Workers v. Enter. Corp.*, 363 U.S. 593, 597 (1960)).

¹⁴⁷ 1 GRENIG, *supra* note 115, § 9:30, at 213.

Furthermore, the parties can anticipate the needs of arbitration and shape remedies that will suit specific disputes.¹⁴⁸ For example, the board can include an arbitration agreement in the common interest development's bylaws that includes specific remedies for commonly occurring disputes, such as ones involving noise, pets, parking, and other quality of life issues. The parties to the dispute can either agree to the arbitration agreement or the board may be able to force arbitration by amending its bylaws.¹⁴⁹ Arbitrators have a degree of flexibility not available in litigation, and they tend to "split the baby" by giving each side a compromised decision in an attempt to satisfy both parties.¹⁵⁰ Arbitration, however, lacks the degree of flexibility available in mediation.¹⁵¹

Arbitration has several disadvantages. The primary criticism of arbitration is that it is too much like litigation. In both arbitration and litigation, the parties present evidence to a neutral decisionmaker who declares a winner and a loser.¹⁵² An arbitrator, like a judge, "has to say one party is right or wrong."¹⁵³ In fact, the role of an arbitrator is "not unlike that of a judge"; they both perform essentially the same function.¹⁵⁴ Arbitration is also similar to litigation because it is an adversarial procedure where the parties concentrate on defeating the opposing party, as opposed to searching for common ground and compromise.¹⁵⁵ Arbitration, like litigation, consists of opening statements, direct and cross examination of witnesses, and can include closing statements.¹⁵⁶ Therefore, arbitration retains much of the character and adversarial nature of litigation. Furthermore, arbitration is viewed by some as just as

¹⁴⁸ Costello, *supra* note 125, at 22.

¹⁴⁹ Romano, *supra* note 39.

¹⁵⁰ Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts To Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 588 (2007).

¹⁵¹ See Lent, *supra* note 74.

¹⁵² Pessen, *supra* note 107.

¹⁵³ Lent, *supra* note 74 (quoting Eric Tuchmann, General Counsel for the American Arbitration Association) (internal quotation marks omitted).

¹⁵⁴ Goldsmith, *supra* note 77.

¹⁵⁵ *Id.*

¹⁵⁶ Mark A. Drummond, *Advice for Your First Arbitration*, 32 LITIG. NEWS 7, 7 (2007).

expensive and time consuming as litigation, and over the past twenty to thirty years, arbitration has “bloomed into another form of litigation.”¹⁵⁷

Also, arbitration is generally “binding on the parties regardless of whether either side agrees with the decision of the arbitrator.”¹⁵⁸ These types of decisions led to the saying “a good compromise is one that leaves both sides equally unhappy.” This may discourage one or both parties from using arbitration in the future and thus result in costly lawsuits because both feel they at least have an opportunity to achieve their desired result in litigation. There is also “the perception that arbitrators ignore the law and tend to apply ‘rough justice’ ” that leads to a “cut-the-baby” approach, which infuriates a party who feels he has done nothing wrong.¹⁵⁹ Depending on the circumstances of the dispute, a compromised award can be either a positive or negative outcome.

Another potential weakness of arbitration is that in certain circumstances, one of the parties may desire publicity and want to create precedent.¹⁶⁰ If the parties are subject to binding arbitration, these goals are not well served. For example, if a resident believes that his co-op board refused to approve the sale of a unit because the potential buyer was a minority, the resident may very well want to expose the board to negative publicity and create binding precedent that would prevent other boards from acting in a similar manner. Privacy is generally a positive attribute of arbitration, but it can have negative implications in individual cases where the threat of bad publicity can be used as a bargaining tool to change board policy or common interest development bylaws and restrictions.

Finally, many of the positive attributes of arbitration disappear when arbitration is nonbinding. If arbitration is nonbinding, there may be diminished incentive for parties to compromise because they can still go to court afterwards if they

¹⁵⁷ Lent, *supra* note 74 (quoting Simeon Baum, President of Resolve Mediation Services, Inc.) (internal quotation marks omitted).

¹⁵⁸ Romano, *supra* note 106.

¹⁵⁹ Kenneth Gumbiner, *An Overview of Alternative Dispute Resolution*, in THE LITIGATOR'S HANDBOOK, *supra* note 125, at 1, 12 (internal quotation marks omitted).

¹⁶⁰ ALTERNATIVE DISPUTE RESOLUTION: HOW TO RESOLVE YOUR DISPUTE WITHOUT GOING TO COURT, *supra* note 87.

do not like the outcome of the arbitration.¹⁶¹ Nonbinding arbitration also prematurely exposes a party's trial strategy when presenting the case to an arbitrator. A party may intentionally present a weak case to the arbitrator in order to see the other side's case, knowing that the results are not binding. When mandatory, nonbinding arbitration can be just another added cost and delay in getting a final resolution to a dispute.

On the other hand, nonbinding arbitration provides the parties with an opportunity to have a neutral decisionmaker evaluate their respective cases, which may provide a sobering reminder of the realistic strengths and weaknesses of a party's case. Furthermore, nonbinding arbitration is more like mediation than litigation because the parties shape their own settlements rather than having one imposed upon them by the courts.¹⁶²

Arbitration has many significant advantages over litigation, but it still retains some of litigation's weaknesses. Despite arbitration's limitations, it can be a powerful tool for common interest development boards to provide legal costs and provide residents a fast and economical solution to their disputes.

C. *Use of Mediation in Condo and Co-op Disputes*

Mediation is another effective method for resolving condo and co-op disputes. Mediation is where parties to a dispute meet with a neutral third party to facilitate a settlement. The aim of mediation is to reach a jointly acceptable compromise between the parties. Mediation differs from litigation and arbitration in that a mediator does not make any decision regarding the merits of the parties' claims.¹⁶³ A mediator cannot impose a settlement and does not make a binding ruling.¹⁶⁴ Mediators aid negotiations by defining the issues, removing impediments to communication, and investigating possible means of resolving the dispute.¹⁶⁵ Mediators accomplish these goals by providing a framework within which the parties negotiate. They help control

¹⁶¹ See Apfelberg, *supra* note 141 (noting that nonbinding arbitration preserves the right to sue); see also 1 GRENI, *supra* note 115, § 22:51, at 568.

¹⁶² Gumbiner, *supra* note 159.

¹⁶³ See *id.* at 6.

¹⁶⁴ 1 GRENI, *supra* note 115, § 2:16, at 27.

¹⁶⁵ *Id.*

the agenda of the negotiations, clarify misunderstandings between the parties, make suggestions for mutually satisfactory resolutions, and ensure fairness in the process.¹⁶⁶

Mediation has several advantages over litigation and arbitration. The most significant advantage of mediation is the parties' ability to shape relief that is individually tailored for their dispute. Mediation leaves the parties in control of the settlement process, rather than ceding the result to a judge, jury, or arbitrator.¹⁶⁷ In litigation and arbitration, the relief that can be provided is limited by substantive law.¹⁶⁸ Additionally, arbitrators are also limited by the terms of the arbitration agreement.¹⁶⁹ Mediators, on the other hand, may suggest creative and innovative solutions to help the parties resolve their conflict.¹⁷⁰ For example, mediators are not constrained to recommending monetary relief. This flexibility is particularly helpful in quality of life disputes that arise in common interest developments.¹⁷¹

Bruce A. Cholt, a Manhattan co-op lawyer, provides an excellent example of the virtues of mediation for quality of life issues in condo and co-op disputes.¹⁷² In his scenario, an upstairs neighbor has young children that play on hardwood floors, and the noise disturbs the downstairs neighbor.¹⁷³ The upstairs neighbors have not violated the condo or co-op restrictions, however, because their apartment has the required eighty percent carpeting—although not on the areas the children are playing.¹⁷⁴ While a judge or arbitrator may be powerless to address this problem because the upstairs neighbors are technically in compliance with the rules, a mediator could persuade the upstairs neighbor to add more carpeting, have the children play on the existing carpeting, or move the existing

¹⁶⁶ BENNETT G. PICKER, *MEDIATION PRACTICE GUIDE: A HANDBOOK FOR RESOLVING BUSINESS DISPUTES* § 1.3, at 3–4 (2d ed. 2003).

¹⁶⁷ William Struyk, *Mediation* (Autumn 2007), <http://www.cnyc.org/code/archive/legal/archive-mediation-A07.htm>.

¹⁶⁸ 2 ROHAN & RUSKIN, *supra* note 79, § 11.10.

¹⁶⁹ Romano, *supra* note 106; *see also* 1 GRENIG, *supra* note 115, § 4:3, at 63 (noting that arbitrators cannot take the same “initiatives” as mediators when resolving disputes).

¹⁷⁰ *See* Romano, *supra* note 106.

¹⁷¹ *See* Pessen, *supra* note 107.

¹⁷² *See* Romano, *supra* note 106.

¹⁷³ *Id.*

¹⁷⁴ *See id.*

carpeting to where the children play.¹⁷⁵ Mediators can bypass dogmatic adherence to the rules and help reach a compromise that best serves the parties' needs. Courts and arbitrators lack the ability to facilitate the same kind of meaningful settlement that a mediator can provide. However, it is the parties who have the responsibility of reaching an acceptable compromise; a mediator is merely a catalyst for helping them to reach that point.¹⁷⁶

Mediation also offers flexibility in the process used to resolve a dispute because "the parties 'own' the process."¹⁷⁷ The parties decide the logistics and rules, and the mediator guides settlement discussions and facilitates communication. Attorneys representing the parties may be present, but they are not necessary.¹⁷⁸ Also, the parties are free to choose what level of presentation of evidence and discovery is appropriate.¹⁷⁹ Typically, mediation does not feature discovery, but the parties can agree to exchange documents when appropriate.¹⁸⁰ Additionally, parties do not usually present evidence but can use it to educate the mediator about the details of the dispute.¹⁸¹ Furthermore, the parties can set both when and where mediation is to take place. These relaxed rules in dealing with evidence, procedure, and discovery allow parties to explain their position in a manner that is not available in a courtroom.¹⁸² Mediators do not judge the merits of disputes; rather, their job is to help the parties reach an agreement. While mediators lack formal decisionmaking authority, they are able to "exert power by affecting parties' perceptions of a dispute, setting the agenda, exploring possible outcomes, and drafting the precise wording of an agreement."¹⁸³

¹⁷⁵ *See id.*

¹⁷⁶ *See* Krivis, *supra* note 78.

¹⁷⁷ Mollen, *supra* note 3, at 96.

¹⁷⁸ Grosberg, *supra* note 7, at 509.

¹⁷⁹ *Id.*

¹⁸⁰ W. Reece Bader et al., *How To Get to Alternative Dispute Resolution*, in THE LITIGATOR'S HANDBOOK, *supra* note 125, at 35, 50 (document exchange may be necessary in determining damages or educating the mediator about the nuances of the dispute).

¹⁸¹ *Id.* at 51.

¹⁸² *See* Romano, *supra* note 73.

¹⁸³ Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253, 261–62 (2006).

Mediation also provides both confidentiality and privacy. It is private because it is not open to the public or the media; only the parties may attend. Similarly, it is confidential because the parties cannot disclose the mediation's settlement negotiations.¹⁸⁴ A mediator is also generally obligated to maintain both privacy and confidentiality.¹⁸⁵ Confidentiality in mediation may be covered by state or federal law.¹⁸⁶ Furthermore, Federal Rule of Evidence 408 limits the admissibility of mediation proceedings.¹⁸⁷

However, the parties should enter into a confidentiality agreement to ensure that statements made during the course of the mediation will remain confidential and will be inadmissible in court.¹⁸⁸ Confidentiality agreements also eliminate any ambiguity in interpreting statutory and case law.¹⁸⁹ As in arbitration, confidentiality during mediation allows the parties to fully express their grievances without the fear of publicizing private or embarrassing information. Confidentiality enables the parties to express themselves in a candid manner without appearing weak to third parties and the public.¹⁹⁰ Often, the publicity related to a condo or co-op dispute can have a more negative impact than the underlying dispute itself.¹⁹¹ Confidentiality allows parties to fully vent their frustrations and anger, resulting in a cathartic effect that helps the sides reach a compromise.¹⁹² Without confidentiality, the parties will not fully participate in negotiations and mediation would be rendered ineffective.

Mediation also preserves the relationship of the parties to a dispute. This is especially important in common interest developments because residents and board members will have

¹⁸⁴ 1 GRENIG, *supra* note 115, § 4:10.

¹⁸⁵ ALTERNATIVE DISPUTE RESOLUTION: HOW TO RESOLVE YOUR DISPUTE WITHOUT GOING TO COURT, *supra* note 87.

¹⁸⁶ 1 GRENIG, *supra* note 115, § 4:13; *see also* GOLANN & FOLBERG, *supra* note 119, at 350.

¹⁸⁷ FED. R. EVID. 408; *see also* 1 GRENIG, *supra* note 115, § 4:11.

¹⁸⁸ 1 GRENIG, *supra* note 115, § 4:11.

¹⁸⁹ *Id.* § 4:15.

¹⁹⁰ Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 37–38 (1986).

¹⁹¹ PICKER, *supra* note 166, § 2.5, at 23. An example of negative publicity having a greater impact than the dispute itself is when the negative attention of a particularly bitter lawsuit drives down the desirability and value of the condo or co-op development as a whole.

¹⁹² *See* Krivis, *supra* note 78.

some level of interaction after a dispute is resolved, regardless of the outcome.¹⁹³ The nature of mediation diminishes enmity and hatred by helping parties find common ground and forge an agreement, rather than relying on a third party decisionmaker.¹⁹⁴ Mediation helps repair relationships by giving the parties an opportunity and forum to address one another face-to-face.

Even if a settlement is not reached through mediation, the parties may lose their hostility toward one another and preserve their future relationship.¹⁹⁵ Mediation allows the parties to reach a “win-win” solution that takes into account the parties’ future relationship.¹⁹⁶ By opening dialogue between the two sides, meditation can also prepare the parties to craft pragmatic solutions that give both sides what they want, or at least a solution they are willing to accept.¹⁹⁷ In contrast, when parties go straight to litigation or arbitration, they are often forced into a posture where they are unwilling to compromise and one of them is nearly certain to be unhappy with the result.

A related benefit of mediation over litigation and arbitration is that it allows for more effective communication between the parties. The goal of mediation is to facilitate the parties’ ability to comprehend the interests of both sides, instead of concentrating solely on defending one position.¹⁹⁸ The opportunity to present one’s case and to understand one’s opponent helps bring about compromise.¹⁹⁹ Mediation allows parties to communicate to find mutually acceptable solutions, rather than “postur[ing] heavily in hopes of ‘winning.’”²⁰⁰ Parties’ satisfaction with mediation “derives from the opportunity to participate actively in the process, voice one’s side of the case, and feel that others have listened and understood

¹⁹³ See Elisha & Wiltgen, *supra* note 9, at 15.

¹⁹⁴ See Siegler, *supra* note 43.

¹⁹⁵ See Mollen, *supra* note 3, at 96.

¹⁹⁶ Bader et al., *supra* note 180, at 42.

¹⁹⁷ See Julie Marcus, Mediation: Making Peace in the Eye of the Storm (Spring 1997), <http://www.cnyc.org/code/newsletters/1997/1997-spr-mediation.htm>.

¹⁹⁸ SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* § 3:2, at 3-5 (2d ed. 2001 & Supp. 2007).

¹⁹⁹ Lent, *supra* note 74 (quoting Simeon Baum, President of Resolve Mediation Services, Inc., who asserts that “[m]ediation focuses on quality of communication. When you feel you’ve been heard and you understand someone, you’re going to get along better.”).

²⁰⁰ *MEDIATE (DON’T LITIGATE) YOUR CO-OP/CONDO RESIDENTIAL DISPUTE*, *supra* note 80.

one's viewpoint."²⁰¹ Mediation is personal in nature and helps the parties "develop a sense of investment" in its outcome, which enables them to be more open minded when listening to their opponent.²⁰² Additionally, the personal contact of mediation improves communication and facilitates the process.²⁰³ Furthermore, because the parties in common interest disputes fully understand the problem, and because these disputes generally involve low dollar amounts, enabling direct communication is particularly important.²⁰⁴

Common interest disputes are often based on "emotional issues rather than practical ones" and relatively insignificant disputes can quickly escalate.²⁰⁵ Mediation reduces emotional barriers to communication that prohibit compromise.²⁰⁶ Again, mediation presents a forum that allows parties to purge their frustration and reach productive solutions by allowing them to openly express their feelings and discuss legally extraneous matters.²⁰⁷

Even if the parties are not communicating directly at first, the mediator can facilitate a dialogue by meeting with them individually to fully understand their respective positions. These private meetings, known as caucuses, familiarize mediators with the details of the dispute.²⁰⁸ Because these meetings are confidential, parties can be completely forthright with the mediator, who enables them to objectively assess their positions.²⁰⁹ However, these private meetings can be counterproductive if the parties are working towards an agreement on their own and should only be used when they reach an impasse.²¹⁰

²⁰¹ COLE ET AL., *supra* note 198, § 4:4, at 4-24.

²⁰² PICKER, *supra* note 166, § 2.5, at 22.

²⁰³ Rabinovich-Einy, *supra* note 183, at 255 (asserting that the "in-person" nature of ADR is crucial because it "allows for rich communication that includes body language, tone of voice, and silence").

²⁰⁴ See DeDino, *supra* note 67, at 895.

²⁰⁵ Romano, *supra* note 39 (quoting Benjamin F. Sands, a New York mediator) (internal quotation marks omitted).

²⁰⁶ 1 GRENIG, *supra* note 115, § 4:2, at 62.

²⁰⁷ COLE ET AL., *supra* note 198, § 4:4, at 4-23 to -25.

²⁰⁸ Gumbiner, *supra* note 159, at 6.

²⁰⁹ *Id.*; see also Lent, *supra* note 74 ("It is a well-known fact that parties overestimate the strength of their own case. A mediator can help give an objective view with respect to the likely outcome of their case." (quoting Eric Tuchmann, general counsel for the American Arbitration Association)).

²¹⁰ Gumbiner, *supra* note 159, at 6.

Private caucuses serve many functions: they help form a trusting relationship between the mediator and the parties, they allow parties to vent frustrations without disrupting the joint session and generating more hostility, and they enable the mediator to determine the parties' needs.²¹¹ Also, mediators can use these sessions to clarify misunderstandings and gauge whether the parties are truly interested in settlement.²¹² At the conclusion of a caucus, a party decides what information the mediator may share with the opposing party.²¹³ Also, mediators can recommend that parties disclose certain information gleaned in a private caucus that the mediator believes will help achieve a settlement.²¹⁴

The cost of mediation is another advantage over litigation and arbitration. Mediation can frequently be achieved at a fraction of the expense of litigation.²¹⁵ The primary way that mediation saves the parties money is by encouraging settlement.²¹⁶ Settlement eliminates the risk of a high jury verdict and reduces the amount of legal fees incurred by both sides of a dispute. Also, mediation saves money by facilitating document exchange and eliminating much of the cost associated with discovery.²¹⁷ Moreover, mediation is less costly than litigation and arbitration because "mediation often resolves the dispute in just one or two short sessions of 2 or 3 hours," as opposed to months or years.²¹⁸ Quality of life disputes in common interest developments are the type of conflicts that can be resolved quickly through mediation because they do not involve complex factual or legal issues. The speed of mediation reduces attorney fees, litigation expense, and indirect costs connected with prolonged litigation.²¹⁹ Additionally, because it is not

²¹¹ 1 GRENIG, *supra* note 115, § 5:12, at 94.

²¹² See Mollen, *supra* note 3, at 95–96.

²¹³ PICKER, *supra* note 166, § 3.2.6, at 32.

²¹⁴ *Id.*

²¹⁵ 2 ROHAN & RESKIN, *supra* note 79, § 11.10.

²¹⁶ See Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) ("[L]awyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial.").

²¹⁷ See Krivis, *supra* note 78 (noting that an advantage to mediation is a mediator's ability to help the parties reach an agreement on informal document exchange).

²¹⁸ Struyk, *supra* note 167.

²¹⁹ PICKER, *supra* note 166, § 2.5, at 22.

necessary for a party to be represented by an attorney during mediation, the parties are able to save money, especially in small dollar quality of life disputes that arise in condos and co-ops.²²⁰

Even an unsuccessful mediation may reduce costs “by abbreviating the discovery phase of litigation and defining the remaining issues.”²²¹ Furthermore, if mediation fails to produce a settlement, it may still ease tensions to the point that the parties agree to arbitrate rather than litigate their dispute.²²²

Finally, mediation should be considered as an option in condo and co-op disputes because of its high success rate. Experts vary on the effectiveness of mediation, with estimates ranging from seventy percent up to ninety percent.²²³ However, even if mediation is successful only seventy percent of the time, it is still a very powerful tool to resolve disputes as quickly, cheaply, and painlessly as possible. Also, litigation or arbitration is still available should the parties fail to reach a settlement through mediation.²²⁴ Litigation can be put on hold while the parties attempt to mediate and then be resumed if the mediation fails.²²⁵

Despite mediation's many positive attributes, it is not without its disadvantages, and it is not appropriate in all circumstances. One of the most significant limitations on mediation is that the parties usually cannot be compelled to participate.²²⁶ Often the most difficult step in mediation is getting the parties to agree to mediate in the first place.²²⁷ Because mediation is normally a voluntary process, the parties

²²⁰ See Grosberg, *supra* note 7, at 509.

²²¹ Marcus, *supra* note 197.

²²² See, e.g., COLE ET AL., *supra* note 198, § 4:4, at 4-22 to -23 (“Research . . . shows that disputants typically come away well-satisfied with the experience even when mediation fails.”).

²²³ See Mollen, *supra* note 3, at 96 (“[T]he American Arbitration Association has reported a success rate of 75%–90% in the mediations which it conducts.”); see also MEDIATE (DON'T LITIGATE) YOUR CO-OP/CONDO RESIDENTIAL DISPUTE, *supra* note 80, at 3 (“Most (70-80%) cases brought to mediation settle, and the process is quicker and cheaper than litigation.”); Michael A. Burns, *Closing Argument: Give Presuit Mediation a Chance*, 20 L.A. LAWYER 60, 60 (1997) (“Where presuit mediation has been tried, the success rate has exceeded 70 percent.”); Struyk, *supra* note 166 (“[M]ediation has about a 70–80% success rate.”).

²²⁴ Mollen, *supra* note 3, at 96.

²²⁵ Struyk, *supra* note 167.

²²⁶ 1 GRENIG, *supra* note 115, § 4:2, at 62.

²²⁷ Romano, *supra* note 79 (quoting Benjamin Sands, a professional mediator in New York).

must be open to the idea of reaching a compromise. A recalcitrant party has the ability to render mediation ineffective from its outset.

A related disadvantage to mediation is that both parties' desire to settle is necessary for it to succeed.²²⁸ If either party absolutely refuses to settle, mediation becomes just another impediment to achieving a final result—either through litigation or arbitration. Furthermore, if the parties have acted in bad faith before attempting to mediate a dispute, the damage to their credibility may be an insurmountable obstacle in reaching a settlement.²²⁹

Another significant weakness of mediation is that its success or failure is heavily dependent on the skill of the individual mediator.²³⁰ Selection of an experienced mediator with “hands on experience solving problems” has been described as “pivotal” to the success of mediation.²³¹ Parties to a common interest dispute should carefully consider their choice of mediator and ensure that he has the proper background, credentials, and experience. Regrettably, a large number of individuals offering mediation services are ineffective or, worse, they contribute to a mediation's failure.²³² In particular, inexperienced or unqualified mediators can irreparably damage settlement negotiations by favoring one party over another.²³³ Unfortunately, there are no uniform standards for mediators' education, training, or practice.²³⁴

Mediation also has several other disadvantages. First, mediation may be used as a form of informal discovery by a party who is looking to save costs and has no intention of settling.²³⁵ Yet, this is not a significant concern in condo and co-op disputes, especially quality of life disputes, because the need for discovery for noise complaints or parking issues is not great. Second, mediation, like arbitration, is inappropriate in cases where either

²²⁸ 1 GRENIG, *supra* note 115, § 4:2, at 62.

²²⁹ See PICKER, *supra* note 166, § 2.2.3, at 18 (listing “existence of bad faith in prior negotiations” among the factors weighing against mediation).

²³⁰ 1 GRENIG, *supra* note 115, § 4:2, at 62.

²³¹ Krivis, *supra* note 78.

²³² Gumbiner, *supra* note 159, at 8.

²³³ *Id.*

²³⁴ ALTERNATIVE DISPUTE RESOLUTION: HOW TO RESOLVE YOUR DISPUTE WITHOUT GOING TO COURT, *supra* note 87.

²³⁵ Gumbiner, *supra* note 159, at 8.

of the parties wants to set legal precedent.²³⁶ Common interest boards may desire a court victory to vindicate their rights and prevent other residents from violating restrictions. On the other hand, a condo or co-op resident may want a court to void a restriction that is inconsistent with the law. Finally, settlements reached in mediation are unenforceable until the parties enter into a binding contract.²³⁷ However, it is rare for mediated settlements to collapse after mediation is complete.²³⁸

Mediation offers parties to a condo or co-op dispute a cost effective and flexible remedy to conflicts that may otherwise spiral out of proportion. In spite of mediation's short comings, it offers an economical alternative to litigation and arbitration that helps preserve the parties' relationship. Condo and co-op boards should strongly consider adding a mediation provision to their bylaws or proprietary leases.

IV. MANDATORY ADR IN CONDO AND CO-OP DISPUTES

A. *The Advantages of Mandatory ADR*

Mandatory ADR requires parties to a dispute to attempt mediation or submit to nonbinding arbitration. Mandatory ADR offers a variety of benefits to both residents and boards in common interest development disputes. First, mandatory ADR eases overcrowding of court dockets because the vast majority of cases settle.²³⁹ Second, mandatory ADR discourages frivolous claims from the outset by exposing flaws in marginal claims and adding an additional layer of time and expense to all claims.

Mandatory ADR levels the playing field for residents involved in condo and co-op disputes by removing personal economics from the equation. Residents in common interest developments are often at a significant disadvantage when litigating against the board because the board is better able to bear the costs of a lawsuit.²⁴⁰ Mandatory ADR prevents the board from using litigation as a first resort in an effort to discourage residents from pursuing meritorious claims. Also, in

²³⁶ PICKER, *supra* note 166, § 2.2.3, at 18; *see also* Field et al., *supra* note 144, at 76.

²³⁷ 1 GRENIG, *supra* note 115, § 4:30, at 78.

²³⁸ Goldsmith, *supra* note 77.

²³⁹ *See* FLA. STAT. ANN. § 718.1255(3)(b) (West 2010).

²⁴⁰ *See id.* § 718.1255(3)(a).

disputes between two neighbors, there may be a large disparity in the each party's personal resources. ADR provides cost effective methods of achieving relief, especially in quality of life disputes.²⁴¹

Another benefit of mandatory ADR is that it forces boards to participate in negotiations and helps prevent costly and acrimonious litigation. Many boards do not want to relinquish their ability to sue for fear of losing a perceived advantage they have in litigation.²⁴² This advantage may vary based on the jurisdiction. For example, Florida courts apply a reasonableness standard when reviewing board actions, which prohibits the board from adopting "arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life of the various unit owners."²⁴³ A resident challenging board action in a jurisdiction that applies a reasonableness standard must show that the board acted unreasonably. On the other hand, New York courts apply a business judgment rule standard when reviewing board actions.²⁴⁴ Under this standard, a board's actions made in "good faith," using "honest judgment," and in "legitimate furtherance of [the common interest development's] purposes" are immune from judicial review.²⁴⁵ Residents contesting board action under a business judgment rule standard must show that the board breached its fiduciary duty "in the form of bad faith, acts outside the board's authority or discriminatory acts."²⁴⁶ Regardless of the standard applied by a particular court, board action enjoys a presumption of validity, and it is very difficult for residents to have a board's decision overturned in court.²⁴⁷ Because of the deference courts give to boards' actions, boards are reluctant to give up their advantage

²⁴¹ *Id.* § 718.1255(3)(d).

²⁴² Librett, *supra* note 51 ("Despite the distinct advantages of arbitration and mediation over costly litigation, many boards are reluctant to give up their power to sue, especially in cases involving themselves, because they feel they may have more leverage during litigation.").

²⁴³ *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975).

²⁴⁴ *See Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 533, 553 N.E.2d 1317, 1319, 554 N.Y.S.2d 807, 808 (1990).

²⁴⁵ *See id.* at 538, 553 N.E.2d at 1321, 554 N.Y.S.2d at 813.

²⁴⁶ Mollen, *supra* note 3, at 83–84 (quoting Richard Siegler, *The Aftermath of Levandusky*, N.Y.L.J., Mar. 2, 1994, at 3).

²⁴⁷ *Id.* at 85.

by considering arbitration or mediation. If ADR is ineffective, the board would retain its favorable position in a subsequent lawsuit.

Another reason to require ADR in common interest disputes is that many parties and their attorneys are hesitant to propose mediation because they fear it will be “interpreted as a sign of weakness.”²⁴⁸ If ADR is mandatory, the parties can avoid posturing and focus on reaching a settlement. Getting the parties to agree to mediation in the first place is the “hardest part.”²⁴⁹ By making ADR compulsory, this initial obstacle is removed, and many more disputes can be settled in an efficient manner. Furthermore, parties are often afraid “they will be forced to compromise” once mediation has begun.²⁵⁰ However, mandatory ADR will force the parties to sit down and learn that a settlement cannot be imposed upon them.

The cost of instituting mediation or nonbinding arbitration may also discourage a party from considering ADR.²⁵¹ Parties may be reluctant to incur additional attorney fees involved in attending and preparing for mediation or nonbinding arbitration.²⁵² Furthermore, ADR entails the time and expense associated with traveling back and forth to mediation sessions and missing time from work.²⁵³ However, these expenses can be trivial compared to the potential cost savings associated with successful ADR. Mandatory ADR forces the parties to adopt a more constructive view of solving the dispute, rather than focusing on short term expenses. Substantive and procedural safeguards can minimize the unnecessary cost of mediation or nonbinding arbitration by setting limits on the time and expense of mediation.²⁵⁴ Residents also benefit from the lower cost of “invoking a neutral resolution process” in compulsory ADR because the procedures and infrastructure are well established.²⁵⁵

²⁴⁸ PICKER, *supra* note 166, § 2.7.

²⁴⁹ Romano, *supra* note 79 (quoting Benjamin Sands, a professional mediator in New York).

²⁵⁰ *Id.*

²⁵¹ See 1 GRENIG, *supra* note 115, § 4:4, at 63.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ See *Alternative Dispute Resolution in Common Interest Developments*, *supra* note 46, at 700.

Finally, mandatory ADR alleviates problems caused by the use of unqualified mediators. States that require ADR have instituted education, training, and qualification standards for mediators.²⁵⁶ Establishing official guidelines for mandatory ADR ensures that “[e]xpert neutral personnel can effectively evaluate the resolution mechanism that appears most appropriate for the particular dispute, and assist in resolution of the dispute.”²⁵⁷ Mandatory ADR provides the framework to implement formal training, education, and certification of mediators and arbitrators, which promotes solutions to condo and co-op disputes. State action is needed because many boards are simply unaware of ADR’s benefits or refuse to use ADR.²⁵⁸

B. States That Have Adopted Mandatory ADR in Condo and Co-op Disputes

Several state and local governments have enacted statutes requiring mandatory ADR.²⁵⁹ The use of mandatory ADR is varied in application, and each state has taken a slightly different approach. Each of the following states provides an example of how mandatory ADR can be implemented.

1. Florida

Florida mandates ADR for condominium²⁶⁰ and co-op²⁶¹ disputes, with certain exceptions.²⁶² The Florida statutes govern

²⁵⁶ See FLA. STAT. ANN. § 718.1255(4) (West 2010) (noting that Florida employs arbitrators and regulates outside arbitrators); *id.* at § 718.1255(4)(f) (noting that mediators must be certified); see also Apfelberg, *supra* note 141 (discussing Nevada’s requirement that mediator-arbitrators have at least five years experience).

²⁵⁷ CAL. LAW REVISION COMM’N, ALTERNATIVE DISPUTE RESOLUTION IN COMMON INTEREST DEVELOPMENTS: TENTATIVE RECOMMENDATION 10 (2002), available at <http://www.clrc.ca.gov/pub/Misc-Report/TR-CID-ADR.pdf>.

²⁵⁸ See Grosberg, *supra* note 7, at 509 n.44 (noting that mediation clauses have only recently become standard in co-op leases).

²⁵⁹ In addition to the states and statutes discussed below, see N.J. STAT. ANN. § 46:8B-14(k) (West 2010) (New Jersey law requiring common interest developments to provide an alternative to litigation); CAL. CIV. CODE § 1345(b) (West 2010) (California law requiring a party, in limited circumstances, to “endeavor” to submit disputes to ADR before bring a lawsuit); N.Y.C.R.R. tit. 22, § 28.2(b) (2010) (New York administrative rule requiring disputes less than \$6,000—or \$10,000 in New York City Civil Court—that are not in small claims part to be submitted to arbitration); MONTGOMERY CNTY. (MD.) CODE ch. 10B (2010) (requiring mandatory ADR once disputes have been submitted to the commission).

²⁶⁰ FLA. STAT. ANN. § 718.1255.

disputes involving a board's actions, or failure to act, based on its bylaws or applicable law and certain board election and meeting requirements.²⁶³ A party to a condo or co-op dispute must submit a petition for nonbinding arbitration before it can file a lawsuit.²⁶⁴ Filing for arbitration tolls the statute of limitations.²⁶⁵ Once a petition has been filed, any party can request that the dispute be referred to mediation.²⁶⁶ Mediation is commenced either by agreement of the parties or a referral by the arbitrator.²⁶⁷ The parties then select a mediator or, if they cannot agree, one is appointed by the arbitrator.²⁶⁸ Parties must attend the mediation or risk sanctions.²⁶⁹ Also, the parties will split the cost of mediation, "unless they agree otherwise."²⁷⁰

Once mediation is commenced, the process is confidential; the arbitrator cannot consider the mediation proceedings should they fail.²⁷¹ Furthermore, if the mediator declares an impasse, the parties can agree to arbitration, either nonbinding or binding, or terminate arbitration and proceed to litigation.²⁷² If the parties agree to nonbinding arbitration, the arbitrator's decision is admissible in court if the parties later litigate.²⁷³ A nonbinding decision will become enforceable by the parties if neither party files a lawsuit within thirty days.²⁷⁴ If, however, a party commences a lawsuit and fails to obtain a judgment that is "not more favorable than the arbitration decision," then that party is liable for the other party's arbitration fees—including attorney's fees—and expenses.²⁷⁵

²⁶¹ *Id.* § 719.1255 (applying the language of section 718.1255 of the Florida Code to co-op disputes).

²⁶² *See id.* § 718.1255(1).

²⁶³ *Id.* § 718.1255(1)(a)–(b).

²⁶⁴ *Id.* § 718.1255(4)(a); *see also id.* § 718.1255(4)(b) (detailing the requirements for the petition).

²⁶⁵ *Id.* § 718.1255(4)(i).

²⁶⁶ *Id.* § 718.1255(4)(e).

²⁶⁷ *Id.*

²⁶⁸ *Id.* § 718.1255(4)(f).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* § 718.1255(4)(h).

²⁷² *Id.*

²⁷³ *Id.* § 718.1255(4).

²⁷⁴ *Id.* § 718.1255(4)(k).

²⁷⁵ *Id.* § 718.1255(4)(l).

2. Nevada

Nevada also requires parties to a condo or co-op dispute to resort to ADR prior to instituting a lawsuit.²⁷⁶ Nevada created an Ombudsman position to explain to the parties their rights, to process claims submitted to arbitration, and to perform a variety of administrative functions.²⁷⁷ The Ombudsman also attempts to mediate the dispute before it is referred to formal mediation or arbitration.²⁷⁸ If the Ombudsman cannot help the parties reach a settlement, the case is referred to a certified mediator-arbitrator.²⁷⁹ Commencing arbitration or mediation tolls any applicable statute of limitations.²⁸⁰ The parties are free to choose mediation, nonbinding arbitration, or arbitration,²⁸¹ but, if they cannot agree on the form of ADR, nonbinding arbitration will be used to settle the dispute.²⁸² The party instituting ADR must serve an opponent with the claim and an explanation of Nevada's mediation and arbitration procedures in condo and co-op disputes.²⁸³ An arbitrator is either chosen by the parties from three names supplied by the Ombudsman or, if the parties cannot agree, the Ombudsman appoints one.²⁸⁴ If the parties fail to reach an acceptable resolution through mediation or nonbinding arbitration, they are free to file a lawsuit.

²⁷⁶ NEV. REV. STAT. ANN. § 38.310(1) (West 2010). *But see id.* § 38.300(3) (excluding a civil action for an injunction and one relating to title of residential property from mandatory alternative dispute resolution).

²⁷⁷ *See id.* § 116.625.

²⁷⁸ Apfelberg, *supra* note 141.

²⁷⁹ *Id.* (explaining that arbitrators are either agreed upon by the parties or appointed by the Ombudsman and that arbitrators must have at least five years of arbitration experience); *see also* NEV. REV. STAT. ANN. § 38.340(1) (requiring the Real Estate Division of the Department of Business and Industry to provide a list of available mediators and arbitrators).

²⁸⁰ NEV. REV. STAT. ANN. § 38.350.

²⁸¹ *Id.* § 38.320(1)(c).

²⁸² *See* NEV. ADMIN. CODE § 38.350(5)–(6).

²⁸³ NEV. REV. STAT. ANN. § 38.320(3); *see also id.* § 38.340(2) (requiring the Real Estate Division of the Department of Business and Industry to establish and maintain a “document . . . contain[ing] a written explanation of the procedures for mediating and arbitrating claims”); NEV. ADMIN. CODE § 38.350(1) (requiring service of “written claim and the statement explaining the procedures for mediation and arbitration on the opposing party within 45 days after filing the claim”).

²⁸⁴ Apfelberg, *supra* note 141.

3. Hawaii

Hawaii's approach to mandatory ADR is slightly different than other states that require ADR in condo and co-op disputes. Hawaii does not require ADR as a prerequisite for filing a lawsuit. However, once either party to a condo dispute requests mediation²⁸⁵ or arbitration,²⁸⁶ the other party must participate.²⁸⁷ If the other party refuses to participate in mediation, a court can consider the refusal when awarding costs and fees, including attorney's fees.²⁸⁸ However, the parties normally pay their own costs associated with mediation.²⁸⁹ Once mediation is commenced, the parties are required to participate for two months, but they may agree to continue beyond that.²⁹⁰

In arbitration, the parties are not bound by the rules of evidence, except those relating to privileged communications, and the arbitrator has the ability to restrict the scope of discovery if it causes excessive delays or cost.²⁹¹ Also, the arbitrator has the sole discretion to award fees in the arbitration.²⁹² An arbitrator must always provide an award in writing²⁹³ and, if requested by a party, provide findings of fact and conclusions of law.²⁹⁴ If either party is not satisfied with the result of arbitration, they must file a lawsuit "within ten days after service of the arbitration award."²⁹⁵ The arbitration award is inadmissible at trial.²⁹⁶ If, however, the party demanding a trial "does not prevail at trial," that party is liable for the "costs, expenses, and attorneys' fees of the trial."²⁹⁷

²⁸⁵ See HAW. REV. STAT. ANN. § 514B-161 (West 2010).

²⁸⁶ See *id.* § 514B-162.

²⁸⁷ See *id.* §§ 514B-161(a), -162(a). But see *id.* § 514B-161(b) (listing certain disputes that are not subject to mandatory mediation); *id.* § 514B-162(b) (listing certain disputes that are not subject to mandatory arbitration); see also *id.* § 514B-162(c) (setting forth the procedure for disputing the applicability of mandatory arbitration).

²⁸⁸ *Id.* § 514B-161(a).

²⁸⁹ *Id.*

²⁹⁰ *Id.* § 514B-161(c).

²⁹¹ *Id.* § 514B-162(a).

²⁹² *Id.* § 514B-162(e).

²⁹³ *Id.* § 514B-162(f).

²⁹⁴ *Id.* § 514B-162(g).

²⁹⁵ *Id.* § 514B-163(b).

²⁹⁶ See *id.* § 514B-163(c).

²⁹⁷ *Id.* § 514B-163(d).

V. CONCLUSION

Condo and co-op ownership has exploded in recent years and will likely continue to increase in the future. To avoid costly litigation that has accompanied the boom in common interest developments, boards should require ADR for certain disputes. Although alternative dispute resolution is not appropriate for every type of dispute, it offers a quick, cheap, and private way to resolve differences. Furthermore, a board can tailor an arbitration or mediation clause however they see fit. For example, ADR could be limited to disputes under a certain dollar amount or certain causes of action could be excluded from ADR. However, mediation should be required in every dispute because it will force parties to come to the bargaining table and facilitate settlements. By requiring parties to mediate, far more cases will be resolved at the beginning stages before high costs are incurred and parties become entrenched in their positions. Parties who refuse to settle in mediation will incur slightly higher costs than if they had proceeded directly to litigation. However, the benefit of quickly settling a larger amount of cases justifies subjecting recalcitrant parties to the added expense. Additionally, boards should use a combination of mediation and arbitration for certain disputes; if mediation fails, the parties will then have to arbitrate their dispute.

Because common interest development boards are hesitant to adopt ADR and cede their advantage in litigation, state legislatures should enact laws requiring ADR. There are a variety of legislative approaches to mandatory ADR in condos and co-ops, and legislators are free to choose a scheme that best serves the public. These laws can be tailored to cover disputes that should be arbitrated, while allowing other disputes to proceed directly to court. By requiring parties to use ADR, legislatures will prevent one side from appearing weak if he suggests that a dispute be mediated or arbitrated. Additionally, mandatory ADR will help ease congested court dockets and ultimately save both the parties and the state money.